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Towards a Jurisprudence of Fashion

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Cover Page Footnote

Founder and Director, Fashion Law Institute, a nonprofit organization headquartered at Fordham University School of Law and the world's first academic center dedicated to the law and business of fashion. Thanks to the Fordham Intellectual Property, Media & Entertainment Law Journal Editor-in-Chief Jeffrey Greenwood and the journal staff for their groundbreaking commitment to this project; the contributing authors; and my esteemed colleague, Fashion Law Institute Associate Director, Jeff Trexler.

Towards a Jurisprudence of Fashion

Susan Scafidi*

*People nowadays are so absolutely superficial that they don't understand the philosophy of the superficial A well-tied tie is the first serious step in life.*¹

With this, the *Fordham Intellectual Property, Media, and Entertainment Law Journal's* first issue dedicated to fashion law, an emerging legal field takes one more step out of the closet and into the mainstream of legal academia.

After my research began late in the last millennium, defining fashion law as a serious academic discipline and calling for its recognition via a blog, *Counterfeit Chic*,² and other avenues, Fordham was the law school that gave me the opportunity to teach the world's first Fashion Law course.³ Then, in 2010, Fordham became the site for our launch of the Fashion Law Institute. Two master's degrees in fashion law, a ten-course curriculum, dozens of public programs, and hundreds of designers assisted through our

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¹ OSCAR WILDE, *A WOMAN OF NO IMPORTANCE* 91 (1893).

² *Counterfeit Chic* was the first website dedicated to fashion law and was considered so novel at the time that the site was the subject of an article in *The New York Times*. See Dan Mitchell, *Fashion's Cutthroat Edge*, *N.Y. TIMES* (Aug. 12, 2006), <https://www.nytimes.com/2006/08/12/business/12online.html> [https://perma.cc/374Q-RQRB]. My advocacy for fashion law extended to the offline realm as well, including academic, legal, and fashion panels. See *COUNTERFEIT CHIC*, <http://www.counterfeitchic.com> [https://perma.cc/NKJ3-YGWC].

³ See Susan Scafidi, *Fiat Fashion Law! The Launch of a Label – and a New Branch of Law*, in *NAVIGATING FASHION LAW* 7 (2012) (describing the establishment and definition of “fashion law” as a legal field).

Fashion Law Pop-Up Clinic later, the Law School and the Institute are known worldwide as the epicenter of the still-growing fashion law movement. The publication of scholarly articles is equally important to fashion law's development, and this special issue is a vital contribution to the field.

The range of subjects covered in these articles exemplifies the breadth of fashion law itself, which I described as encompassing all of the legal issues that arise over the life of a garment, from the designer's dream to the consumer's closet and beyond. Intellectual property is, of course, the most familiar legal issue associated with fashion law, and over the past two decades we have seen several fashion-related cases that have had a substantial impact on the contours of intellectual property law. For example, the Supreme Court's *Wal-Mart v. Samara Brothers* trademark decision, establishing the legal contours of product configuration trade dress, arose from a dispute over alleged knockoffs of a line of children's clothes.⁴ In *Egyptian Goddess v. Swisa*, the Federal Circuit's abandonment of a five-point novelty test for design patent infringement made design patents a far more attractive means of protection for all sorts of fashion-related products, not just the nail buffers at issue in that case.⁵ Arguably the most important intellectual property development pertaining to fashion came in the Supreme Court's landmark ruling in *Star Athletica v. Varsity Brands*, the cheerleader uniform copyright case that confirmed the statutory separability standard for the copyrightability of original pictorial, graphic, and sculptural works incorporated into useful articles.⁶

Intellectual property and its protection—or lack thereof—of the embodiments of designers' ideas are nevertheless but the tip of the proverbial iceberg. Corporate finance, employment law, supply chain regulation, sustainability, taxes and tariffs, advertising, consumer protection, and dress codes and civil rights—these and

⁴ 529 U.S. 205, 207–08 (2000).

⁵ 543 F.3d 665, 678 (Fed. Cir. 2008), *cert. denied*, 556 U.S. 1167 (2009).

⁶ 137 S.Ct. 1002, 1016 (2017). I served in my personal capacity as an expert witness for ultimately victorious plaintiff Varsity Brands, and the Fashion Law Institute's Supreme Court amicus subsequently outlined the statute-based reasoning ultimately adopted in the majority opinion.

other legal issues are all integral parts of fashion law, often with distinct applications in the fashion space. As in the case of intellectual property, sometimes legal reform involves addressing significant gaps in the protections afforded the fashion industry, such as giving child models the same statutory protection granted to child actors⁷ or establishing state and local-level legal protections against sexual harassment for models, make-up artists, and other independent contractors⁸—initiatives in which the Fashion Law Institute once again played a central role. The Article by Mary Kate Brennan⁹ (Fashion Law LLM ‘17) on the implications of antitrust and maritime law for Amazon’s attempt to dominate the fashion industry by controlling international shipping is another case in point. The relevance of admiralty and antitrust to fashion might not be intuitively obvious to lawyers and law students more familiar with intellectual property, but there are decades, even centuries, of law that is not only of historical interest but also directly relevant to law and public policy today. Other connections between fashion and specific legal issues remain to be fully explored: for example, Alessandra Dagirmanjian’s Note on money laundering and the art market mentions related regulation of dealers in precious metals, gems, and jewelry, who are often targeted in anti-money-laundering investigations.¹⁰

The significance of fashion law, however, extends beyond the fact that it cuts across the full spectrum of legal disciplines. What makes fashion law a particularly apt focus for this journal is its unique role among technological media as a form of expression for both creator and wearer.¹¹ In the words of pioneering theorist Marshall McLuhan, a medium is at base an extension of

⁷ See N.Y. EXEC. LAW § 411 (McKinney 2002).

⁸ See N.Y. EXEC. LAW § 296-d (McKinney 2018); 8 NYC ADMIN. CODE § 107 (2018).

⁹ Mary Kate Brennan, *Controlling Cargo: Amazon’s Predatory Attempt to Disrupt the Fashion Industry by Dominating the International Transportation of Goods*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 477 (2019).

¹⁰ Alessandra Dagirmanjian, *Laundering the Art Market: A Proposal for Regulating Money Laundering Through Art in the United States*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 687 (2019).

¹¹ See Susan Scafidi, *Fashion as Information Technology*, 59 SYRACUSE L.R. 69 (2008).

ourselves.¹² Fashion serves not only as an extension of the human self in a quite literal manner, both a surrogate for and simulacrum of the skin's function as a bodily covering, but also an organic means of visible creative expression, conveying who we are (or how we wish to be seen) as individuals or members of a group.¹³ At base, fashion is an identity-bearing good whose connection to our bodies and our sense of self is so intimate that even its absence can send a message, albeit at times an inchoate or enigmatic one.

From this vantage point, fashion law is far more than just a field of study that happens to touch upon a wide range of legal issues, or even simply another industry-specific field of law akin to sports, entertainment, health, or banking law.¹⁴ Just as fashion is a fundamentally human means of expressing a complex array of distinct identities—some serious, some playful, some enduring, some transient, all significant—fashion law itself reflects the boundless scope of self-creation. A designer may have an original idea, but the legal implications of that idea do not stop with debating the rationale or economics of protecting its embodiment. Respecting the integrity of the designer's personal expression; accommodating wearers' interests in acquiring the design to send their own messages; assuring that the production, sale, and ultimate disposition of the goods are consistent with public values of sustainability and regard for human life; aligning the global fashion trade with national or cultural identity—the intrinsic bond between fashion and our sense of who we are gives even the most technical areas of black letter law the potential to show more colorful hues. For example, the proposal in Dorothy Newman's Note to extend existing provisions of the Lanham Act to enforce corporate social responsibility codes references the identity-

¹² MARSHALL McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7 (1994).

¹³ *Id.* at 3–4, 119–22.

¹⁴ *Contra* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL FORUM 207 (1996) (arguing against the study of specialized fields of law); *but cf.* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) (defending the study of cyberlaw as a discrete field against Easterbrook's criticism).

bearing nature of many consumer goods, especially apparel.¹⁵ Similarly, the authors who explore biometric data and privacy in this issue offer telling illustrations: Vincent Nguyen's Article on the range of privacy concerns that may arise when a consumer visits an offline retail store,¹⁶ Elias Wright's Note on the future of facial recognition technology,¹⁷ and Michael Rivera's Note analyzing existing state statutes on biometric privacy¹⁸ offer different prescriptions, but all three point to the conclusion that regulation of data security and privacy can take on a different valence when it goes beyond tracking clicks and card numbers to customized marketing or sharing a smart-mirror's full-body scan.

For legal practitioners and academics alike, this creative impulse at the heart of fashion and the fashion industry requires an equally expansive approach to understanding the institutional dynamics of fashion law. Fashion defines us from multiple perspectives, from individuals in themselves to organizational forms and political structures. Likewise, fashion law as a field of study is not limited to governmental laws and regulations; it also includes both public and private organizations' rules and broader social norms. This multivariate institutional complexity exponentially increases the possibilities for identity conflicts and connections in fashion law doctrine and theory alike, such that the same set of fashion facts can give rise to radically contrasting views.

Although I admire Ann Bartow's longstanding scholarly commitment to exploring the intersection of intellectual property and feminism, for example, she and I draw very different conclusions regarding the Supreme Court's decision in *Star Athletica*, which she discusses in this issue in the context of

¹⁵ Dorothy Newman, Fair Trade-Mark: Proposing an Affirmative Duty on Licensors to Enforce Their Corporate Social Responsibility Codes, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 729 (2019).

¹⁶ Vincent Nguyen, *Shopping for Privacy: The Privacy Issues Presented by Brick and Mortar Retail Stores*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 535 (2019).

¹⁷ Elias Wright, *The Future of Facial Recognition Is Not Fully Known: Developing Privacy and Security Regulatory Mechanisms for Facial Recognition in the Retail Sector*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611 (2019).

¹⁸ Michael A. Rivera, *Face Off: An Examination of State Biometric Privacy Statutes & Data Harm Remedies*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 571 (2019).

reviewing of Orly Lobel’s recent book about the fashion-adjacent *Mattel v. MGA Entertainment* case, popularly known as *Barbie v. Bratz*.¹⁹ Bartow argues that the majority willfully ignored the women’s bodies underneath the cheerleader costumes in order to reach its decision; I believe that the Court’s opinion accurately reflects the statutory language that conveying information—in this case about wearers’ roles as cheerleaders and to some extent their physical forms—is not a disqualifying utilitarian function in copyright terms.²⁰ Indeed, had the Court failed to recognize that the graphic designs incorporated into cheerleader uniforms were copyrightable subject matter, I might have suspected that it was refusing to take seriously the creative authorship involved in fashion design, a field culturally associated with women and gay men.²¹

While the understanding of fashion law and culture can vary significantly among the rising number of commentators, the richness of the ongoing discussion reflects the infinite depth of this fascinating field, which not long ago the legal academy dismissed as too superficial to be worthy of study. This year Fordham celebrates one hundred years of women at the Law School, and with that milestone in diversity comes a new recognition of the contribution of all types of scholars, teachers, practitioners, and writers to the study of law. As we continue to engage the challenges and opportunities perennially emerging from the female-dominated fashion realm, we can be assured that this journal’s first issue on fashion law is another new beginning.

¹⁹ Ann Bartow, *Barbie in Bondage: What Orly Lobel’s Book “You Don’t Own Me: How Mattel v. MGA Entertainment Exposed Barbie’s Dark Side” Tells Us About the Commoditization of the Female Body*, 29 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 435 (2019).

²⁰ See 17 U.S.C. § 101 (2017). “A ‘useful article’ is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” See *id.*

²¹ See Shakti Jothianandan, *Fordham’s Fashion Law Institute Will Serve, Protect, Talk Shoes*, *THE CUT* (Aug. 11, 2010) https://www.thecut.com/2010/08/fashion_law_institute.html (“Fashion is a pink-and-lavender discipline. It’s associated with women and gay men, and there is an ongoing perception that this is a lighthearted subject.”); see generally Brief for Fashion Law Institute et al., as Amicus Curiae Supporting Respondents, *Star Athletica v. Varsity Brands*, 137 S.Ct. 1002 (2017) (No. 15-866), 2016 WL 5349673.